

# **Innovation and Transformation in Public Sector Employment Relations: Future Prospects on a Contested Terrain**

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**Abstract:** Challenges to public sector collective bargaining drive a return to “first principles” regarding underlying rights in the public sector, the nature of public sector work, and the nature of labor markets. Building on this foundation, the paper presents a new institutional framework centered on “creating value” and “mitigating harm” in public sector employment relations. The importance of each is illustrated with data on innovation in public sector education. In particular, a review of seven cases of labor-management innovation in public education reveals the added value that can be achieved through joint initiatives centered on improving educational outcomes. Broader implications for innovation and transformation in public sector labor-management relations are identified.

**Key Words:** public sector, collective bargaining, transformation, education reform, innovation, institutions, mitigating harm, creating value

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## I. INTRODUCTION

Challenges to public sector employment relations have emerged in over a dozen states with surprising intensity. These challenges have re-opened what were considered long-resolved debates and raised questions about fundamental underlying principles in employment relations. At stake is the capacity of government to deliver services efficiently and effectively to citizens, the dignity and rights of public workers, and the institutional arrangements designed to provide structure and balance to employment relations. There is a need for innovation and transformation in public sector employment relations, connecting the work people do with “public goods.” However, the current direction of public debate is pointing instead toward parochial power moves, with the risk of gridlock or escalating conflict.

In this policy framing paper, we argue that there are two core functions for any institutional arrangement—mitigating harm and creating value. We assess the dynamics of public sector employment relations along both dimensions. Then, focusing on school reform in education, we provide detailed evidence of what can be termed “islands of success,” where further diffusion and overall transformation is possible, but at risk in the current climate. We conclude with a vision for public sector employment relations (with implications for the private sector as well) that is centered on high performance work systems that take into account public goods.

## II. FIRST PRINCIPLES

The challenges to public sector collective bargaining call for a return to what are sometimes referred to as “first principles.” These are the basic underlying assumptions and points of departure in any debate or theory construction.<sup>1</sup> In order to join debates on public sector collective bargaining, as well as to realize the full potential for innovation and transformation in public sector collective bargaining, it is important to begin with a review of these first principles. We highlight three principles, which are the underlying

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<sup>1</sup> In mathematics and philosophy, first principles represent axioms or foundational assumptions on which theory builds. The mathematician Gödel notably argued that all mathematical proofs must rest on additional assumptions or postulates—they cannot be fully self-contained. See FROM FREGE TO GÖDEL: A SOURCE BOOK IN MATHEMATICAL LOGIC, 1979–1931 (Jean van Heijenoort ed., 3d ed. 1967).

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rights on which public sector collective bargaining rests, the underlying nature of the work in the public sector, and the functioning of labor markets. In each case, these first principles embody a form of “check and balance” that is a further point of departure for any consideration of public sector collective bargaining.

### *A. Constitutional Versus Property Rights*

Collective bargaining established itself first as a societal institution in the private sector. In that context, the rights accorded to employees to join together for collective action were carved out of an employer’s property rights in the business enterprise.<sup>2</sup> The underlying motivation centered on increasing consumer purchasing power, providing a check and balance between labor and management in society, and promoting orderly mechanisms for resolving conflict.<sup>3</sup>

In the public sector, the legal foundations for collective bargaining do not derive from property rights, but rather from federal and state constitutional guarantees of free speech, freedom of assembly, and freedom to redress grievances. As a result, a first principle in public sector collective bargaining is that it rests on constitutional rights, rather than property rights. This was clearly evident in the first major debate in the scholarly literature on public sector collective bargaining, where Wellington and Winter, on the one hand, argued that public sector collective bargaining privileged unions over other actors in society,<sup>4</sup> and Clyde Summers, on the other hand, argued that public sector collective bargaining unions needed the venue of collective bargaining so that employee voice would not be trampled by other actors and other interests.<sup>5</sup> The current challenges to public sector collective bargaining have revived this classic debate, and we will argue, the potential for innovation and transformation in public sector labor-management relations represents an important synthesis.

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<sup>2</sup> HARRY C. KATZ & THOMAS A. KOCHAN, *AN INTRODUCTION TO COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS* (1992).

<sup>3</sup> National Labor Relations Act, 29 U.S.C. §§ 151–169 (1936).

<sup>4</sup> See Harry H. Wellington & Ralph K. Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L. J., 1107, 1107–27 (1969).

<sup>5</sup> See Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L. J. 1156, 1159–61 (1974). In personal correspondence Marty Malin also notes that *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463 (1979), and *Minnesota State Bd. of Cmty. Coll. v. Knight*, 465 U.S. 271 (1984), can be read together as indicating that the Supreme Court is staying out of the debate, leaving resolution up to state law.

In addition to property rights and constitutional rights, there is one more set of legal underpinnings for collective bargaining, which are basic human rights. The United Nations (UN) connected working conditions and collective bargaining to basic human rights by stating in Article 23 of the UN's Universal Declaration of Human Rights:

- Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- Everyone, without any discrimination, has the right to equal pay for equal work.
- Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- Everyone has the right to form and to join trade unions for the protection of his interests.<sup>6</sup>

In 1998 the International Labor Organization (ILO) further elaborated on these basic rights in its Declaration on Fundamental Principles and Rights at Work.<sup>7</sup> While there are many factors that are associated with the push-back in Wisconsin and Ohio after collective bargaining rights were limited or eliminated, it is possible that part of the push-back was perceived overreaching that took away what are seen as basic human rights.<sup>8</sup> These underlying rights are part of a fundamental check and balance between employer and employee rights in society—centered on property rights in the private sector and constitutional rights in the public sector. There will always be tensions between competing rights, at issue is the degree to which these tensions are resolved in constructive or less constructive ways. As Michael Piore points out, these rights only have force when connected to supporting institutional arrangements.<sup>9</sup> By expanding the focus of collective

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<sup>6</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml>.

<sup>7</sup> Declaration on Fundamental Principles and Rights at Work, ILO (1998), <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

<sup>8</sup> See, e.g., Monica Davey & A.G. Sulzberger, *In Wisconsin Battle on Unions, State Democrats See a Gift*, N.Y. TIMES, March 10, 2011, at A1.

<sup>9</sup> See Michael Piore, *Whither Industrial Relations: Does It Have a Future in a Post-Industrial Society?*, 49 BRIT. J. INDUS. REL. 792, 793 (2011).

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bargaining in the public sector to better take into account public goods, we hope to foster just these kinds of connections.

### *B. Professional Work*

Beyond the foundational rights on which public sector collective bargaining rests, another first principle centers on the work itself. Historically, the institutions of collective bargaining have reflected the nature of the work, beginning with craft unions and extending to industrial unions.<sup>10</sup> John R. Commons first connected the changing institutional arrangements with the changing structure of the markets for goods and services.<sup>11</sup> More recently, various scholars have argued that the rise of an information or knowledge economy points toward an institutional form that is more of a professional association than either a craft or an industrial union,<sup>12</sup> a union that derives power more by enabling work than by threatening to withhold labor,<sup>13</sup> and unions as a value-add network.<sup>14</sup>

In the public sector there are jobs that fit older craft models (such as the work of machine repair technicians, construction trades, road crews, etc.), but very few that resemble industrial models (license plate production in prisons is an example, though it is a special case). For the most part, however, the work in the public sector is service work and the work of professionals who must demonstrate specialized expertise in order to be hired (teachers, police, firefighters, child protection workers, forestry workers, environmental scientists, city and regional planners, building and highway inspectors, public defenders, judges, etc.). Thus, it is not a surprise to find that there has been debate over whether the institutional nature of the unions representing these workers is closer to that of a professional association or a trade union.<sup>15</sup> Also note that these “good” jobs in the public sector have provided women and minority workers with greater opportunities than the private sector—progress that is at risk with attacks on public sector workers.

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<sup>10</sup> Katz & Kochan, *supra* note 2, at 19–55.

<sup>11</sup> See JOHN COMMONS ET AL., HISTORY OF LABOR IN THE UNITED STATES 1–5 (John Commons ed., 1935).

<sup>12</sup> CHARLES C. HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION 10–12 (2nd ed. 1996).

<sup>13</sup> JOEL CUTCHER-GERSHENFELD ET AL., KNOWLEDGE-DRIVEN WORK: UNEXPECTED LESSONS FROM JAPANESE AND UNITED STATES WORK PRACTICES (1988).

<sup>14</sup> Saul A. Rubinstein, *Unions as Value-Adding Networks: Possibilities for the Future of U.S. Unionism*, 22 J. LAB. RES. 581, 582–587 (2001).

<sup>15</sup> Note that many of today’s public employee labor unions began as professional associations and fraternal organizations.

The nature of the work is a key factor as we consider the potential for innovation and transformation, since the models have to be appropriate for work that involves service delivery and that draws on various forms of professional expertise. The nature of the work is also relevant in the context of attacks on public sector collective bargaining that have, in the process, disparaged public sector workers and implicitly treated them as expendable. The primary role of state and local government is as a service provider (with relatively few income transfers), which means that its primary role is as an employer of service workers.<sup>16</sup> In the private sector, IBM has embraced service work and established advancing “service science” as a strategic priority.<sup>17</sup> We should expect no less of the public sector. Specifically, we will argue with respect to the next first principle that there are forms of job-specific expertise in which below-market pay and benefits will result in high turnover and have consequences for the quality of service delivery and the conduct of expert work. “Professional standards” represent a form of check and balance on management decisions that would compromise quality of services in the public sector and they also represent a foundation for advancing “public goods” through professionalism on the job.

### *C. Labor Supply and Demand*

A final first principle concerns the nature of labor markets. In the private sector we term labor as a “derived demand” in that there is a market demand for goods and services from which the demand for labor is then derived. In the public sector, there is not a market demand for goods and services in the same way. Rather, under the constitutional authority granted to government agencies, decisions are made about the scale and scope of the government enterprise and then the demand for labor in the public sector is derived from that. The public sector labor market is not independent from the private sector since the supply of labor in many trades and professions can choose between public and private sectors. As we will see, efforts to reduce pay and benefits in the public sector can impair the ability of government agencies to attract and retain the talent needed to operate the government enterprise.<sup>18</sup> In this sense, the labor market imposes a check and balance on policy makers—even if they want to shift to more of a market model to reduce pay and

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<sup>16</sup> *The Diane Rehm Show*, NPR (May 1, 2011), <http://thedianerehmshow.org/shows/2011-01-05/state-budgets-and-public-employees/transcript>.

<sup>17</sup> See John Teresko, *IBM's Winning Strategy*, INDUSTRYWEEK, Mar. 2009, at 18.

<sup>18</sup> See Part III *infra*.

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benefits, the ability to attract needed talent represents a boundary condition. Indeed, in the absence of collective bargaining, public employers may exercise monopsony power,<sup>19</sup> which would drive compensation below an efficient level for attracting, retaining, and motivating workers.

While there are additional institutional considerations that we introduce in the next section, these three first principles are foundational for this paper. That is, employment relations derived from constitutional rights (not property rights), the work itself as primarily service work with a high proportion of professional employees delivering the services, and the dynamics of labor demand as distinct in the public sector, with labor supply as a boundary condition for ensuring effective government operations. The checks and balances associated with each of the first principles point to what might be considered an additional first principle, which is the very concept of checks and balances in civil society.

### III. A FUNDAMENTAL CHALLENGE TO INSTITUTIONS

The pace of change is accelerating in virtually every aspect of our post-industrial society.<sup>20</sup> As a result, all of our core institutions are challenged, impacting the ways we address the full spectrum of societal priorities, including food, water, housing, energy, health, transportation, education, security, religion, the economy, information, justice, and more. In too many cases there is polarization and gridlock or actions that are incomplete in fully addressing societal needs. Recent research on infrastructure systems in society has highlighted two fundamental functional requirements of systems-level institutional arrangements—mitigating harm and creating value, both of which have a long history in institutional scholarship.<sup>21</sup>

First, institutional arrangements need to mitigate harm. This functional requirement rests on the public goods literature. While substantial parts of this literature are focused on what economists term externalities—market failures for which government intervention or other actions are needed—our focus is on the portion of this literature concerned with institutional arrangements that distort or undermine the public interest. In this context, for example, Olson has urged that incentives are needed for actors to advance

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<sup>19</sup> Where there is only one customer for a given good, that customer has monopson power to insist on below market prices.

<sup>20</sup> MICHAEL PIRE & CHARLES SABLE, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* 258–308 (1984).

<sup>21</sup> See generally Joel Cutcher-Gershenfeld & Christopher Lawson, *Valuing the Commons: A Fundamental Challenge across Complex Systems*, (2010) (MIT's Engineering Sys. Div., Working Paper) (on file with author).

the public interest in order to counteract a logic of collective action that devolves to narrow self-interest.<sup>22</sup> Relatedly, Michels has argued that there is an inevitable tendency toward oligarchy where organizational self-preservation will replace the original public good that they were established to pursue.<sup>23</sup> These tendencies risk what are termed “tragedies of the commons” where individuals pursuing rational self-interest end up destroying resources in ways that make everyone worse off. In private sector collective bargaining, an example of mitigating harm can be found in the post-World War II introduction of what was termed the “annual improvement factor” in the auto industry—a formula that provided approximately three percent annual wage increases (beyond cost-of-living increases) based on what were approximately three percent productivity growth. The importance of this formulation is that the wage increases did not happen at the expense of the consumer (mitigating the risk of collusion between labor and management). This risk was highlighted by George Taylor, advisor to five U.S. Presidents on labor policy, when he stated:

The sound use of collective bargaining is dependent, however, upon union and the managements’ voluntarily giving reasonable weight to the broad public interest. . . . A general “ganging up on the consumer” would be incompatible with the development of collective bargaining as a socially desirable institution.<sup>24</sup>

In the context of public sector collective bargaining, we will consider a number of ways that collective bargaining can represent potential harm to the public interest, as well as ways to mitigate such harm. The importance of this dimension is illustrated, for example, in public sector legislation for protective service workers such as police and firefighters, where various forms of interest arbitration are substituted for the right to strike. Marty Malin has argued that there is a fundamental paradox in public sector collective bargaining since the scope of bargaining is narrowly focused on wages, hours, and working conditions (rather than broader public goods), and unions are then seen as anti-democratic since they act as a narrowly focused

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<sup>22</sup> See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 126–127 (2d ed., 1971).

<sup>23</sup> ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* (1949); see also Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

<sup>24</sup> George W. Taylor, *National Labor Policy*, 274 *ANNALS AM. ACAD. POL. & SOC. SCI.* 185, 188 (1951).



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interest group.<sup>25</sup> To resolve the paradox, he calls for a broadening of the scope of bargaining and increased engagement of additional stakeholders in the process.<sup>26</sup> It is in precisely that spirit that we turn to the second functional aspect of an institution, which is to create value.

In addition to mitigating harm, institutional arrangements need to create value. This functional requirement is bound by Abraham Lincoln's call for government to only do for its citizens what they can't do for themselves.<sup>27</sup> Thus, creating value is not a license to pursue anything that looks like it might improve society, but it does suggest that institutional arrangements can and should foster innovation in ways that they are uniquely able to do. Ostrom has documented how private cooperative institutional arrangements have been formed initially to mitigate harm with respect to the use of natural resources.<sup>28</sup> In the process, she identifies ways that these cooperative arrangements create value by, in effect, "expanding the pie" with respect to water resources and other public goods.<sup>29</sup> It was in this spirit in the federal sector, for example, that the 1993 National Performance Review Initiative and the executive order promoting Federal Labor-Management Partnerships<sup>30</sup> both engaged the front-line workforce and their union

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<sup>25</sup> See Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L. J. 1369, 1370–74 (2009).

<sup>26</sup> *Id.* at 1398.

<sup>27</sup> The original text reads:

"The legitimate object of government is to do for a community of people whatever they need to have done, but cannot do at all, or cannot so well do, for themselves, in their separate and individual capacities. In all that the people can individually do as well for themselves, government ought not to interfere. The desirable things which the individuals of a people cannot do, or cannot well do, for themselves, fall into two classes: those which have relation to wrongs, and those which have not. . . . The first—that in relation to wrongs—embraces all crimes, misdemeanors and non-performance of contracts. The other embraces all which, in its nature, and without wrong, requires combined action, as public roads and highways, public schools, charities, pauperism, orphanage, estates of the deceased, and the machinery of government itself."

Fragment of speech on government, possibly July 1, 1854.  
<http://showcase.netins.net/web/creative/lincoln/speeches/quotes.htm>.

<sup>28</sup> ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990).

<sup>29</sup> *Id.*

<sup>30</sup> Exec. Order No. 12,871, 3 C.F.R. 655 (1994), *reprinted as amended* in 5 U.S.C. § 7101 (later rescinded by President George Bush in Exec. Order No. 13,203, 3 C.F.R. 761 (2002), *reprinted as amended* in 5 U.S.C. § 7101 (Supp. 2001)).

representatives in the redesign of work and operations to improve the efficiency and delivery of services by the federal government.

Mitigating harm and creating value are not necessarily flip sides of the same coin. It is possible to only mitigate harm without any new value being created. The use of interest arbitration, for example, does mitigate the risk of disruption of public service but is an imperfect substitute for a negotiated agreement, and it doesn't necessarily better take into account the public interest. Alternatively, it is possible to create value *and* create new forms of harm as well. For example, some public organizations have experimented with gainsharing and goal sharing programs that provided workers with financial incentives to improve the efficiency of public services.<sup>31</sup> Even though some held that public servants shouldn't have access to such incentives, early studies found that the gains to the public far outweighed the costs.<sup>32</sup> Thus, mitigating harm and creating value are conceptually distinct, though closely related. Moreover, public sector collective bargaining has not been sufficiently systematic in either case.

### A. *Historical Dynamics*

Over forty years ago (by 1969), seventeen states had provided for a duty to bargain or established a right to "meet and confer," as Tables 1 and 2 indicate. To a substantial degree, these early laws replicated the private sector model with the exception for the ways in which they tried to address the resolution of impasses in bargaining (for which there was great experimentation in an effort to address this unique aspect of the public sector).<sup>33</sup> There was not, however, additional consideration of either other forms of potential harm to the public interest (such as through narrow work rules) or other ways to create value (such as through joint improvement efforts). Twenty-eight years ago in 1984, these adapted versions of private

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<sup>31</sup> This occurred, for example, under the civil service waiver policy during the Clinton Administration where Federal agencies could petition for a waiver from parts of civil service regulations in order to experiment with human resource management practices. This program was eliminated by President George W. Bush. *See, e.g., The U.S. Office of Personnel Management, Gainsharing Links Performance Management Processes* (Feb. 1995), <http://www.opm.gov/performance/articles/033.asp>.

<sup>32</sup> JOHN M. GREINER ET AL., *PRODUCTIVITY AND MOTIVATION: A REVIEW OF STATE AND LOCAL GOVERNMENT INITIATIVES* (1981); DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1992).

<sup>33</sup> *SCOPE OF PUBLIC-SECTOR BARGAINING* (Walter J. Gershenfeld et al. eds., 1977).

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sector laws were in place in forty-three states, and by 1995, the diffusion went a bit further.

In the 1990s, however, there was some statutory erosion of public employee bargaining rights that can now be seen as a precursor of the current challenges.<sup>34</sup> Oregon eliminated bargaining on certain subjects, for example, such as class size; Michigan prohibited bargaining on a number of subjects in public education and imposed severe penalties for illegal strikes; Wisconsin adopted the “Qualified Economic Offer” which essentially preempted bargaining over salaries in public education; New Mexico’s public employee statute sunset when a Republican governor vetoed legislation that would have renewed it; Illinois enacted the Chicago School Reform Act which prohibited decision and impact bargaining over numerous subjects and temporarily prohibited strikes in Chicago Public School and City College of Chicago; Pennsylvania enacted legislation that would prohibit bargaining in the event of financial emergency in the Philadelphia public schools.

In the first decade of the 2000s there was again an expansion of rights. Malin characterizes this as a reverse swing of the pendulum, including the repeal of the QEO policy in Wisconsin, as well as the extension of bargaining rights to state university faculty and research assistants.<sup>35</sup> Importantly, two issues that sit at the intersection of teacher working conditions and the public interest—teacher preparation time and teacher evaluation plans—became mandatory subjects of bargaining during this decade.<sup>36</sup> A controversial issue in the private sector—card check recognition for new union organizing—was granted for public sector union organizing in Illinois, New Jersey, Oregon, New Hampshire, California, and Massachusetts.<sup>37</sup> Additionally, a number of states extended collective bargaining rights to employees typically considered to be independent contractors—home health care aides and in-home daycare providers.<sup>38</sup> In a 2007 Missouri Supreme Court decision, all employees, not just private sector

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<sup>34</sup> We thank Marty Malin for many of the following notes on statutory erosion.

<sup>35</sup> Martin H. Malin, *The Legislative Upheaval in Public Sector Labor Law: A Search for Common Elements*, 27 A.B.A. J. LAB. EMP. L. 149, 151 (2012).

<sup>36</sup> *Id.*

<sup>37</sup> Robert Bruno et al., *Majority Authorizations and Union Organizing in the Public Sector: A Four-State Perspective*, (May 14, 2009), <http://www.ler.illinois.edu/labor/images/Multi-State%20EFCA%20Report.pdf>.

<sup>38</sup> Janice Podsada, *Home Care Workers Form First CT Union Under SEIU*, HARTFORD COURANT (March 29, 2012), available at [http://articles.courant.com/2012-03-29/business/hc-home-care-union-formed-20120329\\_1\\_home-health-care-aides-care-providers-deborah-chemoff](http://articles.courant.com/2012-03-29/business/hc-home-care-union-formed-20120329_1_home-health-care-aides-care-providers-deborah-chemoff).

workers, were held to have the right to bargain collectively.<sup>39</sup> Also, New Mexico enacted a public employee collective bargaining statute that was stronger than the one which had sunset four years earlier.<sup>40</sup>

Note as well that there is bargaining taking place over the past two decades even where there is no authority to negotiate.<sup>41</sup> For example, there have been Tennessee Appellate Court decisions and Tennessee Attorney General opinions to the effect that unless expressly authorized by statute, local governments lack authority to engage in collective bargaining.<sup>42</sup> Nevertheless, Memphis and Nashville do bargain, they do have collective bargaining agreements, and the parties do arbitrate grievances, even though none of it is legally enforceable. The situation is similar in Salt Lake City and other Utah municipalities where bargaining does take place even in the absence of a supporting state law.

Thus, during this concluding quarter of the last century and the first decade of this century, the trend has been heavily toward expanded rights for public sector workers, with firefighters or teachers often achieving these rights in advance of others. At the same time, there has been some erosion, particularly in areas where public goods were at stake, such as class size, and in order to reduce the impact of public unions on public resources. In this context the challenges to public sector collective bargaining rights during the past two years in at least fourteen states can be understood as part of a larger historic debate in which the core tension between worker rights to bargain collectively have been in tension with public goods that are seen as being at risk due to work rules and financial agreements.

While the diffusion of public sector enabling legislation has been far more limited in “right-to-work” states (Table 2) than what can be termed “right-to-representation” states (Table 1), the challenges have been in both groups of states—revealing vulnerability of the institution to attacks that it was generating harm. The initial quarter century of growth in public sector unionism was faster than the private sector. The recent challenges have happened at an even faster pace. Over 550 bills were introduced in state legislatures challenging aspects of public sector collective bargaining, with changes in thirteen states: Wisconsin, Ohio, Indiana, Arizona, Idaho, Michigan, Montana, New Hampshire, Oklahoma, South Carolina, Tennessee,

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<sup>39</sup> *Independence-NEA v. Independence Sch. Dist.*, 223 S.W. 3d 131, 139 (Mo. 2007).

<sup>40</sup> Malin, *supra* note 35, at 152.

<sup>41</sup> We also thank Marty Malin for his observations on bargaining in the absence of legislative support.

<sup>42</sup> See Op. Tenn. Att’y Gen. No. 95-036 (Apr. 16, 1995); No. 79-172 (Apr. 10, 1979); No. 78-437 (Dec. 28, 1978); and No. 77-362 (Oct. 21, 1977).

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Utah, and Wyoming.<sup>43</sup> The changes in Ohio were subsequently reversed and debates continue in many of these and other states.<sup>44</sup> The current dynamic poses a question—can public sector labor relations sufficiently transform itself as an institution such that labor and management are again leading employment relations in this sector?

[See Tables 1 and 2]

In order to examine the potential for transformation in the public sector, it will be helpful to import a framework from research on private sector industrial relations. In 1986, Kochan, Katz, and McKersie documented the decline of what was termed the “New Deal” industrial relations model and the ascendancy of the non-union (management-led) human resource management model in setting the tone on employment relations in the United States.<sup>45</sup> They argued that the unionized sector (labor and management together) would only be able to re-establish leadership through fundamental changes at three levels of interaction—the workplace level, the collective bargaining level, and the strategic level.<sup>46</sup> Combined together, innovation at all three levels would enable a transformation in U.S. industrial relations. In this paper, we will present evidence to suggest that an equally extensive range of innovations—both mitigating harm and creating value—bringing societal interests into play at all three levels will be needed for a transformation in public sector employment relations.

Figure 1 provides a visual representation of the way the three-tier Kochan, Katz, and McKersie model can be embedded in the societal level. The three tiers are all interdependent, as the arrows indicate. The three additional arrows on the right and left signal that initiatives designed to mitigate harm and create value are relevant at all three levels. These will require fundamental changes to the institution if they are to be fully integral to the operations.

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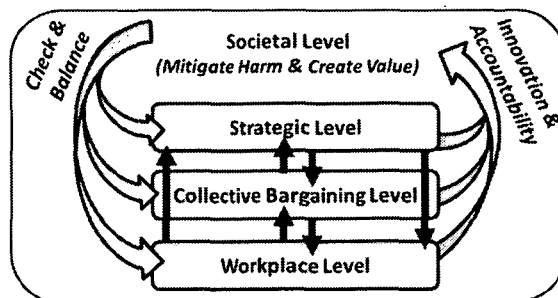
<sup>43</sup> David Schaper, *Collective Bargaining Curbs Spread Across The U.S.*, NPR (May 24, 2011), <http://www.npr.org/2011/05/24/136610879/collective-bargaining-curbs-spread-across-the-u-s>.

<sup>44</sup> Sabrina Tavernise, *Ohio Turns Back a Law Limiting Unions' Rights*, N.Y. TIMES, Nov. 8, 2011, at A1.

<sup>45</sup> THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (1986).

<sup>46</sup> *Id.*

**Figure 1: Three-Tier Transformation Model with Additional Societal Level**



Note that the interplay of forcing and fostering<sup>47</sup> between labor and management still takes place within the three-tier model (the center arrows) in Figure 1. This remains the dominant focus of labor-management interactions. The societal considerations are connected both as a check and balance (the three outside arrows on the left) on the parties and as the result of innovations and public accountability by the parties (the three outside arrows on the right) where they are giving “reasonable weight” to the public interest.

### B. Focus on Mitigating Harm

The original passage of public sector labor legislation was motivated by high profile strikes that disrupted public services. As such, the first consideration in mitigating harm is at the middle “collective bargaining level” of the Kochan, Katz, and McKersie framework.<sup>48</sup> As was noted earlier, public sector labor legislation for protective service workers (police, fire, and others), typically features binding interest arbitration and a prohibition on strikes for this reason. Thus, one functional requirement for institutional arrangements in public sector employment relations is to mitigate escalating “collective bargaining level” conflicts over wages, hours, and working conditions that disrupt public services through strikes or lockouts. In fact, the evidence of numerous studies in the 1970s and 1980s does suggest that the consequences of public sector strikes were far less

<sup>47</sup> See generally RICHARD E. WALTON ET AL., STRATEGIC NEGOTIATIONS: A THEORY OF CHANGE IN LABOR-MANAGEMENT RELATIONS (1994).

<sup>48</sup> KOCHAN, *supra* note 45, at 16.

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damaging to the public interest than was initially feared.<sup>49</sup> Indeed, Malin's 1993 study found that when Illinois and Ohio legalized public employee strikes, strike incident actually decreased.<sup>50</sup>

A second potential harm at the collective bargaining level are specific wage and benefit provisions that are perceived as "overpaying" public sector workers relative to their private sector counterparts. Many of the recent efforts to reduce or eliminate public sector collective bargaining rights have emerged in the context of a budget crisis following the deepest recession since the great depression of the 1930s. In this regard, there have been claims of higher than average wages in the public sector, overly generous pensions, and overly extensive health care coverage.<sup>51</sup> In fact, as was noted under first principles,<sup>52</sup> public sector work has a higher proportion of professional employees in comparison to the private sector and, as a result, any comparison of wages and benefits has to take into account higher education levels (with commensurate higher returns to education). Jeff Keefe conducted this comparison, holding constant for education, and found that public sector workers earned, on average, seven percent less than equally educated private sector workers.<sup>53</sup> When taking into account pensions, the gap was partly closed, with public sector workings receiving approximately four percent lower wages and benefits than equally educated private sector workers.<sup>54</sup> Similarly, Craig Olson has examined teacher pay and benefits for all teachers in Illinois and Wisconsin over more than a decade.<sup>55</sup> He has found that close to or all of the increases in health care costs have been absorbed by the teachers in either higher co-payments or lower than average

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<sup>49</sup> John F. Burton & Charles Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L. J. 418, 440 (1970); David Lewin, *Public Employment Relations: Confronting the Issues*, 12 INDUS. REL. 309, 310 (1973).

<sup>50</sup> Martin H. Malin, *Public Employees Right to Strike: Law and Experience*, 26 MICH. L. REV. 313, 361 (1993).

<sup>51</sup> Andrew G. Biggs & Jason Richwine, *Overpaid Public Workers: The Evidence Mounts*, WALL ST. J., (April 11, 2012), <http://online.wsj.com/article/SB10001424052702304724404577295502528869614.html>.

<sup>52</sup> See *infra* Part II.

<sup>53</sup> DAVID LEWIN ET AL., EMP'T POLICY RES. NETWORK & LAB. AND EMP'T RELATIONS ASS'N, *Getting it Right: Empirical Evidence and Policy Implications from Research on Public Sector Unionism and Collective Bargaining* 4 (2011), <http://www.employmentpolicy.org/topic/402/research/getting-it-right>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

wage increases.<sup>56</sup> Still, ensuring that public sector workers are not overpaid relative to comparable private sector workers is an important consideration.

There is a reciprocal concern with respect to pay and benefits for public sector workers, which is that they not be underpaid. In Montana, for example, the backlash against public sector collective bargaining has taken the form of the Legislature overriding the Governor and voting down a 2011 pay bill in support of a newly negotiated four-year collective bargaining agreement for state employees.<sup>57</sup> As a result, there will not be any pay increase for Montana state employees for the following four years.<sup>58</sup> Given that over a third of the workforce will be eligible to retire in the next four years, state officials are now concerned that the workforce will be underpaid and they will not be able to attract the best talent for the next generation workforce.

At the “workplace level,” a key harm that has figured prominently in efforts to eliminate or weaken collective bargaining provisions has been the claim that poorly performing employees are protected by union collective bargaining agreements. This argument has primarily been leveled against teacher unions.<sup>59</sup> It is important to recognize that there is a public good here—high quality education—and it is certainly the case that high performing teachers have a positive impact.<sup>60</sup> The issue is in the tension with respect to work rules that provide for due process in the discipline or discharge of underperforming workers. In the early public sector literature this issues was joined via scholarship on the scope of collective bargaining. As Gershenfeld notes:

The scope-of-bargaining issue is important because it goes to the heart of the collective-bargaining relationship. The public employer is understandably uneasy when he believes that union demands affect the core of the agency mission. Employees and their organizations are equally distressed when they believe legislation, executive orders, and/or employers

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<sup>56</sup> *Id.* at 6.

<sup>57</sup> Joel Cutcher-Gershenfeld & Joel Schaefer, Montana Labor-Management Summit (June 2011).

<sup>58</sup> *Id.*

<sup>59</sup> For example, the discussions surrounding the documentary WAITING FOR SUPERMAN (Participant Media 2010), <http://www.waitingforsuperman.com/action/>.

<sup>60</sup> Raj Chetty et al., *Great Teaching: Measuring its Effects on Students' Future Earnings*, EDUCATION NEXT (Summer 2012).



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unreasonably seek to limit their legitimate concerns involving income and security.<sup>61</sup>

As we will illustrate with data on innovation in public education, there are illustrative teacher unions and public employers who are partly resolving this tension by expanding the scope of bargaining to include joint workplace-level initiatives aimed at advancing the public mission.<sup>62</sup> Still, there is a key question as to whether these efforts are sufficiently robust to ensure the public that the public goods associated with education or the public goods in other areas of the public sector are sufficiently protected.

An opposite harm at the “workplace level” involves what might be called the collateral damage from attacks on public sector collective bargaining rights. Many of these attacks directly or indirectly imply that public sector workers are ineffective (and overly protected), overpaid (and wasting tax dollars), and self-centered (not taking into account the public interest). In fact, many people choose to work in the public sector out of a sense of mission or public service, not pursuing private sector careers that might be more lucrative. As well, there is a measure of professional pride that imbues the work of many public sector employees. To the extent that public sector workers feel that they are being diminished, disrespected, or even demonized by the attacks on public sector collective bargaining, then there is harm as reflected in the quality of service delivery, the costs of higher turnover, and a reduced ability to recruit new talent.

At the strategic level, the original debates between Wellington and Winter and Summers<sup>63</sup> centered on a question as to whether there was harm to the public by unions having privileged influence over the allocation of public resources. The first wave of public sector scholarship in the 1970s and 1980s examined these issues closely and concluded that the potential for influence was tempered by many factors, including: legislation limiting tax increases, the structure of local governments, and more.<sup>64</sup>

Interestingly, there is also a counter argument that can be made at the “strategic level,” which is that the Supreme Court decision in the *Citizens United* case,<sup>65</sup> has incentivized parts of the Republican Party to challenge the legitimacy of unions as a means to weakening the Democratic Party. This

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<sup>61</sup> Gershenfeld et al., *supra* note 33, at 1.

<sup>62</sup> See *infra* Part X.

<sup>63</sup> Wellington & Winter, *supra* note 4, at 1107–27; Summers, *supra* note 5, at 1159–61.

<sup>64</sup> Thomas A. Kochan, *A Theory of Multilateral Collective Bargaining in City Governments*, 27 INDUS. & LAB. REL. REV. 525, 525–42 (1973).

<sup>65</sup> *Citizens United v. Fed. Election Comm’n*, 130 S.Ct. 876 (2010).

has less to do with a rejection of collective bargaining and more to do with gaining political advantage at the expense of collective bargaining. This too is a form of harm that should be mitigated.

To summarize, mitigating harm in public sector labor relations involves at least the following:

**Mitigating Harm at the Strategic Level**

- Public sector unions having too great an ability to influence public officials on the allocation of public resources
- Public sector officials having too great an ability to undercut public sector unions for political gain separate from employment relations

**Mitigating Harm at the Collective Bargaining Level**

- Minimizing or eliminating disruptions to public services due to strikes or lockouts
- Specific contractual provisions on wages and benefits that result in public sector workers being over paid or underpaid relative to private sector workers

**Mitigating Harm at the Workplace Level**

- Work rules and labor-management practices that diminish public goods
- Attacks on public sector unions that erode dignity and respect for public employees

Transformation of employment relations will require attending to the linkages across levels when it comes to mitigating harm. Indeed, where the challenges to public sector collective bargaining have been successful, it has been because the challenge has been at all three levels—challenging the way work rules diminish public goods (such as by protecting poor performing employees), challenging the results of collective bargaining as excessive, and challenging the very existence of unions as having too much influence over public officials.

Any restructuring and innovation in public sector collective bargaining has to explicitly address these potential forms of harm at all three levels. What are ways to assure the public that parties are not pursuing self-interest in ways that create potential harm for the public? Without tangible answers to this question, the institution is vulnerable to attacks. To fully understand and address this vulnerability, it is important to consider also the capacity to create value.

### *C. Focus on Creating Value*

The literatures on labor-management cooperation in the public and private sectors are almost entirely focused on creating value. While there has been some legislative support for labor-management cooperation or partnership in both public and private sectors, the majority of innovation has occurred without the benefit of policy initiatives that might confer additional legitimacy, support for demonstration projects, resources for training, access to expertise, and facilitated sharing of leading practices—all the things that can accompany policy support.<sup>66</sup>

In the public sector (as in the private sector), the collective bargaining level has primarily served as the platform for the launch of labor-management committees and joint initiatives that address workplace level operations.<sup>67</sup> Also at the collective bargaining level in the public sector, there have been joint initiatives on containing health care costs and introducing performance-based pay programs.<sup>68</sup> For example, under the 1993 National Performance Review Initiatives, some government installations received waivers from Civil Service Provisions to introduce gain sharing and goal sharing programs that incentivized performance improvements (cost savings, quality improvements, etc.).<sup>69</sup>

At the workplace level, joint efforts have addressed improvements in operational efficiency, implementation of continuous quality improvement programs, establishment of service delivery teams, identification of cost saving opportunities, improvements in workplace health and safety, and related initiatives.<sup>70</sup> A 1996 U.S. Department of Labor study of fifty public sector workplaces found that labor-management cooperation and employee

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<sup>66</sup> Labor-Management Relations Act 29 U.S.C. §§ 141–197. This Act is illustrative of the policy intent and the practical reality—the act articulates the creation of value as the goal, yet the act has never been fully funded and the rules governing its administration limit its focus to short-term demonstration projects.

<sup>67</sup> U.S. DEPARTMENT OF LABOR TASK FORCE, WORKING TOGETHER FOR PUBLIC SERVICE: REPORT OF THE U.S. SECRETARY OF LABOR’S TASK FORCE ON EXCELLENCE IN STATE AND LOCAL GOVERNMENT THROUGH LABOR-MANAGEMENT COOPERATION 3–4, 13–23, 49–51 (1996).

<sup>68</sup> *Id.*

<sup>69</sup> AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS 34 (1993).

<sup>70</sup> DAVID LEWIN ET AL., PUBLIC SECTOR LABOR RELATIONS: ANALYSIS AND READINGS 1113–21 (3d ed. 1988).

participation led to dramatic improvements in quality, costs, and delivery of service.<sup>71</sup>

At the strategic level in the public sector, value is created in advancing “public goods” that go well beyond wages, hours, and working conditions. This is reflected, for example, in teachers joining with administrators to jointly improve educational outcomes, police and firefighters reaching agreements to jointly improve public safety, natural resources employees jointly improving environmental stewardship, and other similar joint initiatives. Consider the following illustrative contract language from Article 24 of the San Juan Unified School District in California:

The District and the Association agree to take responsibility and be held accountable for the improvement of the quality of teaching and learning which represents an expanded role in public education. It is in the best interest of the San Juan Schools that the District and the Association cooperatively engage in activities and communication which demonstrate mutual respect for all stakeholders and results in the improvement of student achievement through development of common goals, a cooperative, trusting environment and teamwork. It is the [parties'] belief that actively and constructively involving all relevant stakeholders contributes significantly toward achieving these goals.

Shared responsibility and accountability for results are at the core of a continuous improvement model. Joint responsibility for student success means that educators share in celebrating what works and share in identifying together areas that are not working and are in need of improvement.<sup>72</sup>

This sort of language is designed to create value at the level of the overall strategy for the educational enterprise. Unlike the strategic level in the private sector where the alignment is usually around business strategy (or mitigating externalities such as environmental impacts), the focus at this level in the public sector is on advancing public goods. This is an interesting counterpoint to the Wellington and Winter argument—where unions and their members are reflecting a genuine interest in and commitment to public service.<sup>73</sup>

To summarize, creating value in public sector labor relations involves at least the following:

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<sup>71</sup> DEPARTMENT OF LABOR TASK FORCE, *supra* note 67.

<sup>72</sup> San Juan Unified School District & San Juan Teachers Association, Collective Bargaining Contract 83 (2012).

<sup>73</sup> See generally Wellington & Winter, *supra* note 4.

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### Strategic Level

- Joint agreements and initiatives aimed at advancing “public goods”

### Collective Bargaining Level

- Incentives to attract, develop, motivate, and retain the best quality workforce

- Mechanisms to contain benefit cost

### Workplace Level

- Fostering continuous improvement in operations
- Valuing the work itself

As was the case with mitigating harm, transformation requires some degree of alignment across levels. For example, in the early 1990s the State Department of Natural Resources in Michigan launched a Continuous Quality Improvement (CQI) initiative at the workplace level.<sup>74</sup> This required enabling support at the collective bargaining level. Then, as service delivery teams were formed in various regions (combining the monitoring of air quality, water quality, etc.), a proposal emerged to restructure the agency operations around natural watersheds rather than county boundaries. This ultimately led to a split in the agency—with the administration of parks and recreation retaining the county-based structure and the new Department of Environmental Quality incorporating some of the team-based and watershed-based ideas. In this process, both labor and management were engaged in processes aimed at creating value at all three levels—workplace, collective bargaining, and strategic—though the split was an unexpected outcome.<sup>75</sup>

In the absence of unions and collective bargaining, the potential labor-management mechanisms for creating value and mitigating harm at all three levels would be absent. While there would be less risk of strikes and lockouts, that doesn’t mean that there would be no risk of collective action by employees. Moreover, without collective bargaining, there would have to be some comparable forum within which employee interests could be balanced with other relevant interests. Not only is there a risk, as Clyde Summers argued, of employee interests being trampled by other interests<sup>76</sup> (which is not in the public interest when it comes to the delivery of services and the assurance of basic human rights), but there is the risk of incomplete

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<sup>74</sup> CUTCHER-GERSHENFELD ET AL., *WORKER TRAINING IN MICHIGAN: A FRAMEWORK FOR PUBLIC POLICY, POLICY CHOICES: FRAMING THE DEBATE FOR MICHIGAN'S FUTURE*, FACULTY OF INSTITUTE FOR PUBLIC POLICY AND SOCIAL RESEARCH (1994).

<sup>75</sup> JOEL CUTCHER-GERSHENFELD & KEVIN FORD, *VALUABLE DISCONNECTS IN ORGANIZATIONAL LEARNING SYSTEMS: INTEGRATING BOLD VISIONS AND HARSH REALITIES* (2005).

<sup>76</sup> Summers, *supra* note 5, at 1159–61.

advancing of employee professionalism, pride in craft, and commitment to public service. To fully appreciate what is possible with unions and collective bargaining, we will focus on the specific case of union-management collaboration on school reform.

#### IV. COLLABORATIVE SCHOOL REFORM

For more than a decade the debate on improving U.S. public schools has focused on teacher quality. Policy directives from Washington and from state houses across the country have pushed the expanded use of classroom and performance standards, merit pay, and teacher evaluation based on high stakes testing of students. These policies have come from both Republicans (No Child Left Behind)<sup>77</sup> and Democrats (Race to the Top).<sup>78</sup> In addition, both have promoted market-based reforms including the widespread use of charter schools and privatization. Yet, there is little research that shows these reforms to be effective. In fact, a pivotal study on charter schools shows them to be no better than regular public schools.<sup>79</sup>

Despite the lack of evidence on the efficacy of market-based solutions, public policy initiatives have continued to focus on individual teacher quality. Further, there has been little systematic research on innovation and reform that has been created locally from within school districts rather than imposed from above. Research co-led by one of the co-authors of this paper attempts to fill that gap and analyze reform efforts that are already in public school districts across the country.<sup>80</sup> This study examines collaborative efforts by teachers, their unions, and administrators to reform public education through locally developed innovations that improve schools, both teaching quality and student achievement.<sup>81</sup> The research was conceptualized around understanding how local teachers' unions *add value* to educational quality through their influence on teaching and student performance.<sup>82</sup> As we will see, it also plays a role in *mitigating harm* to parties not at the bargaining table. The broad aim is to shift the debate on

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<sup>77</sup> No Child Left Behind (NCLB) Act of 2001, 20 U.S.C. §§ 6301–6578 (2001).

<sup>78</sup> Race to the Top (RTT) Act of 2011, S. 844, 112th Congress (2011).

<sup>79</sup> See generally CENTER FOR RESEARCH ON EDUCATIONAL OUTCOMES, STANFORD UNIVERSITY, MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN SIXTEEN STATES (2011).

<sup>80</sup> Saul A. Rubinstein & John E. McCarthy, *Public School Reform through Union-Management Collaboration*, 20 ADVANCES INDUS. & LAB. REL. 19 (forthcoming 2012).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

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school reform from ideology to proven innovation that is already working, to share the elements common to sustained collaboration around school improvement, to understand how local unions add value to school performance, and to identify ways that such efforts mitigate actual or perceived harm for the public.

This research now includes seven cases of collaborative partnerships between teachers, local unions and administrators that have all been sustained for fifteen years or more. The districts—ABC Unified School District, Cerritos, California; Toledo, Ohio; Hillsborough, Florida; Plattsburgh, New York; Norfolk, Virginia; St. Francis, Minnesota; Charlotte County, Florida—come from across the country—north and south, east and west. They come from right-to-work states and those with stronger collective bargaining representation rights. They are urban and rural, large and small. These districts also have a significant proportion of students on free or reduced-price lunch. The research team visited all seven districts and conducted interviews that included union presidents, current and former superintendents, central office administrators, principals, union representatives and executive board members, teachers, support staff, board members, and members of the business community. In addition, archival data was reviewed, including contracts, memoranda of understanding, student performance data, and internal reports. The full presentation of the research is forthcoming by Rubinstein and McCarthy.<sup>83</sup> Preliminary findings are summarized here to inform this framework.

### *A. Long Term Collaborative Partnerships—Common Patterns*

#### *1. Crisis as Motivation to Collaborate*

In most of these districts a strike or a vote to strike was the critical event that sparked both the local union and the administration to seek an alternative direction in their union-management relations. They recognized that their adversarial relationships were not in the best interests of teachers, students, or administrators.<sup>84</sup> Collaborative approaches to school improvement were seen as a more productive alternative. There is an extensive literature documenting various aspects of what Lewin termed the “unfreezing” of social relations<sup>85</sup> and what Richard Walton termed a “golden middle” where

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See Kurt Lewin, *Defining the 'Field at a Given Time'*, 50 PSYCHOL. REV. 292, 292–310 (1943).

there is sufficient crisis to unfreeze existing relations, but not so much of a crisis as to undermine the capacity for innovation.<sup>86</sup> Actual or potential harm to the public were all part of this unfreezing process.

Why don't parties just choose to collaborate from the outset? Sometimes union-management relationships are collaborative from the outset, but even these relationships always have to address a mix of integrative and distributive issues<sup>87</sup> and there are many ways that relations can deteriorate and become centered on distributive conflicts. As we will see below, a fundamental policy challenge is to facilitate collaboration without having to depend on a severe, unfreezing crisis.

## 2. Strategic Priorities

All seven districts focused their collaborative efforts on teaching quality and student performance as core goals for reform and improvement. They experimented with innovations such as:

- Union-led professional development
- New systems of teacher evaluation
- Mentoring programs
- Peer-to-peer assistance
- Teaching academies

The parties also worked together analyzing student performance in order to develop priorities, and then establish data-driven plans for improving achievement. This approach parallels the way continuous quality improvement programs operate in the private sector, where the distributed knowledge of the workforce is focused through high levels of employee engagement.<sup>88</sup> As Sidney Rubinstein observed on the private sector, "we have a convergence of two necessities: the kind of work environment which will bring self-fulfillment converging with the kind of workplace that is essential for long-term economic growth. How we manage the transition and cope with the change is critical."<sup>89</sup>

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<sup>86</sup> RICHARD WALTON, *INNOVATING TO COMPETE: LESSONS FOR DIFFUSING AND MANAGING CHANGE IN THE WORKPLACE* (1987).

<sup>87</sup> See generally RICHARD WALTON & ROBERT MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (Seymour E. Harris ed., 1966).

<sup>88</sup> See generally WILLIAM EDWARDS DEMING, *OUT OF THE CRISIS* 23–24 (1982); BILL BRADLEY ET AL., *PARTICIPATIVE SYSTEMS AT WORK: CREATING QUALITY AND EMPLOYMENT SECURITY*, (Sidney P. Rubinstein ed. 1987); CUTCHER-GERSHENFELD, *supra* note 13.

<sup>89</sup> Rubinstein, *supra* note 14.



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In the public sector the equivalent convergence is meaningful work for public sector employees that also ensures responsible stewardship of public resources. In this sense, when public sector work is performed well, the public interest is usually advanced.

### 3. *Supportive System Infrastructure*

These districts have all established a culture of collaboration that promotes trust, values the leadership and organization local unions can provide, and respects teacher professionalism. Governance and day-to-day managerial responsibility are shared by teachers, local union representatives, and principals at both the district and school levels. Joint union-management structures for planning and decision making were created at all levels—the district, school, and teaching.<sup>90</sup> Further, the local unions function as dense networks facilitating collaboration across disciplines and articulation within subjects. This collaboration also extends to school and district-level problem solving where teachers are organized into teams at the grade and department levels to use student performance data in directing improvement efforts. In many cases more than twenty percent of the local union members are involved in some form of collaborative school improvement effort.<sup>91</sup> In this way the union as an institution provides great value in organizing, guiding, and implementing school reform.

### 4. *Sustaining Factors*

These districts have benefited from long-term leadership and the use of internal labor markets. It is not uncommon in these cases for union presidents and superintendents to have served in their positions for a decade or more.<sup>92</sup> This has provided both stability in the institutional partnership between the district and the union, but also for individual partnerships to be formed between the union and administrative leaders, resulting in an increase in “social capital” building the trust necessary for effective collaboration. Further, these districts have often used internal labor markets to fill administrative positions rather than recruit from outside the district. Superintendents will then have spent years in the district, some as teachers—even former union leaders, and then as principals and central office administrators. This gave them extensive experience with the dynamics of

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<sup>90</sup> Rubinstein & McCarthy, *supra* note 80.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

the partnership and the culture of collaboration, as well as strong working relationships with union counterparts before they moved into the top management positions.

### 5. *Value-Adding Unionism*

In all of these school districts, the union participated in, or led, innovation that spans three different forms of “capital” relevant to people in organizations:

#### 1. *Human Capital—Teaching Skills/Capacity*<sup>93</sup>

Local unions in these districts have helped to create highly effective systems of teacher induction, helping new teachers to be successful through extensive coaching and mentoring. They have also created innovative professional development programs, teaching academies, as well as mentoring and peer assistance, and review processes. These all support both new and experienced teachers by strengthening instructional practice. Joint performance evaluation serves as the basis for tenure decisions. In this way the union has taken on the challenge and responsibility for teaching quality. This also mitigates one form of harm that has been evident in various challenges to public sector collective bargaining—the view that teacher unions inappropriately shield under-performing teachers with students suffering as a result. The importance of human capital in generating improved educational outcomes is, of course, well established and reflected in pay scales that reward additional investments by teachers in their own education and development, as well as in-service days for professional development.

#### 2. *Social Capital—Peer Collaboration*<sup>94</sup>

Through the collaborative partnerships, local unions have helped establish teams or committees that enable teachers to have an ongoing dialogue with each other and with administrators around issues such as curriculum development, K-12 subject articulation, cross-disciplinary integration, instructional practice, and student performance data evaluation. Through these forums, teachers create a dense network of relationships that allow them to improve their teaching, support one another, strengthen the

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

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quality of the instructional program, and work together to identify areas of student performance that need improvement and approaches to address these needs. The value generated by these networks isn't limited to the formal educational improvement efforts, but also shows up in an increase in what Jody Hoffer Gittell terms "relational coordination," which represents the performance gains in cases where peoples' work is interdependent.<sup>95</sup> The connection of social capital to educational outcomes has been documented in prior research,<sup>96</sup> though the forthcoming research by Rubinstein and McCarthy adds more precise mapping of social networks and a broader framework incorporating the institutional role of the union.<sup>97</sup>

### 3. *Institutional Capital—Operational Decision Making*<sup>98</sup>

With the goal of improving teaching quality and student achievement, local unions and district administrators have shared governance and decision making through district-wide improvement planning committees, school site-based decision making, and leadership teams. They have also developed joint union-management processes for textbook selection, technology planning, and the hiring of both faculty and administrators. In this way, management is seen not as a specific group or level of employees, but as a function in which the union shares responsibility. Innovation and quality are the job of both faculty and administration. Conceptualizing joint governance as "institutional capital" is a new formulation that captures the formalization of social networks into ongoing rules and structural arrangements.

### 6. *The Union as a Value-Adding Network*

These cases demonstrate that the local union can bring unique capabilities to collaborative partnerships with administration. This includes the ability to form dense networks of members focused on improving teaching quality. These networks facilitate communication within and across schools, aid in collaboration between teachers around a variety of subjects,

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<sup>95</sup> JODY HOFFER GITTELL, *HIGH PERFORMANCE HEALTHCARE: USING THE POWER OF RELATIONSHIPS TO ACHIEVE QUALITY, EFFICIENCY AND RESILIENCE* 25–26 (2009); JODY HOFFER GITTELL, *THE SOUTHWEST AIRLINES WAY: USING THE POWER OF RELATIONSHIPS TO ACHIEVE HIGH PERFORMANCE* 42–43 (2009).

<sup>96</sup> Fritz K. Pil & Carie Leana, *Applying Organizational Research to Public School Reform: The Effects of Teacher Human and Social Capital on Student Performance*, 52 *ACAD. MGMT. J.* 1101, 1111–1119 (2009).

<sup>97</sup> Rubinstein & McCarthy, *supra* note 80.

<sup>98</sup> *Id.*

and support the effective implementation of new policies and practices. While many current policy reforms assume education is an individual enterprise, focusing on individual teacher accountability and practices, this research shows that education is a collective enterprise that can best be improved through a reform of the system. Piecemeal changes will not result in systemic improvement. Therefore, the reform of school systems must necessarily be collaborative among professional educators, and the union can serve as the backbone of the network of teachers central to that effort. This conception of a union as a value-adding institution has been studied across a range of industries in the private sector.<sup>99</sup> It also reflects the model of a union as a professional organization<sup>100</sup> and it is one where the union derives power not through threats to withhold its labor, but through its capacity to enable work.<sup>101</sup>

### *7. Factors that Sustain Union-Management Partnerships*

As noted earlier, long-term leadership from both union and administration were common characteristics of the seven cases we studied. In addition, the use of internal labor markets for developing and promoting top administrators allowed them to understand how a culture of collaboration could foster school improvement, and build trust with their union counterparts.

These districts all invested heavily in joint learning opportunities. This meant sending teams of teachers and administrators together throughout the country to gain knowledge about institutional partnering, joint problem solving, planning, decisionmaking, teaming, and leadership. However, in addition to learning together (human capital) these educational trips also strengthened their relationships (social capital), a key ingredient in effective collaboration.

Further, these districts also built support from their communities for their collaborative partnerships, both directly and through their boards of education. In cases where the boards have not been supportive of joint innovation, the local unions were active in the election process—recruiting and endorsing candidates who valued a collaborative process in their schools and who sought to hire superintendents who shared that view of the district. These locals saw no contradiction between school improvement and engaging actively in the politics of school board elections because they

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<sup>99</sup> Rubinstein, *supra* note 14, at 582.

<sup>100</sup> HECKSCHER, *supra* note 12, at 10.

<sup>101</sup> CUTCHER-GERSHENFELD, *supra* note 13, at 138–41.

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understood the importance of hiring and developing managers who sought a productive and collaborative relationship with them. Note that public sector employees having influence over the election of public officials was criticized in the Wellington and Winter article<sup>102</sup> and more recently in challenges to public sector collective bargaining. In this case, however, the involvement is for the goal of advancing a public good—improved educational outcomes. This contrasts sharply with the implicit assumption in the criticisms, which is that teachers and other educational employees will only use influence in school board election for narrow parochial reasons.

In some cases the partnership arrangements were written into the collective bargaining contracts, or were memorandums of understanding that laid out the parameters for shared planning and decisionmaking. In other cases they were informal arrangements that had developed over time outside of the formal bargaining process. In the cases where contract language existed, the language was enabling rather than prescriptive so the partnerships could address new issues as they arose and bring more people into the collaborative process. Research from the private sector has shown that overly prescriptive language can sometimes limit the scope and effectiveness of collaboration.<sup>103</sup>

Finally, both the union and administration shared accountability for teaching quality and student performance. The union clearly saw that its job was not only to bargain for and represent its members in contract disputes with management, but also to ensure and improve the quality of teaching and education for students.

### B. Policy Implications

Drawing on this framework and research we see several implications for public policy in the educational context:

#### 1. Institutional Support

Districts seeking to create collaborative partnerships between local unions and the administration could be helped by learning networks that would link them with districts that have substantial experience operating in this way. These learning networks could benefit from a sharing of resources

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<sup>102</sup> Wellington & Winter, *supra* note 4, at 1107–25.

<sup>103</sup> Saul A. Rubinstein, *Partnerships of Steel? Forging High Involvement Work Systems in the US Steel Industry: A View from the Local Unions*, 12 ADVANCES IN INDUS. AND LAB. REL. 115, 115–41 (2003).

and experiences across districts. This support could come from state-level institutions and national associations that would provide training, facilitation, technical assistance, a bargaining framework, and multi-stakeholder oversight. As was noted earlier, employment relationships have an inherent risk of becoming entrenched in adversarial dynamics. The availability of institutional support helps to mitigate that risk. An original motivation for providing public employees with collective bargaining rights was to avoid more disruptive dynamics, such as wildcat strikes—now the question is whether additional institutional arrangements are needed to avoid stasis around an adversarial model of collective bargaining. Interestingly, there is the potential to use the platform of collective bargaining itself to formalize joint commitments for advancing educational outcomes, with links to workplace-level activities that take place “after the handshake.”

## *2. Incentives to Create Value*

States can provide waivers from policies now being mandated around teacher evaluation for those districts that demonstrate robust collaborative systems for mentoring and peer evaluation. This model has been adopted in some states in the areas of workers’ compensation and has long been a proposal in the area of health and safety. By reducing the expenditure of resources for monitoring firms that have demonstrated leadership, public funds can be allocated in a more efficient way. Firms given dispensation from mandates would have a responsibility to share innovative practices and be open to benchmarking, which represents an additional check and balance on the leading firms. This is an important example of limiting the role of central government when more decentralized capabilities are sufficient.

Small incentive grants could also be offered. More controversial are forms of teacher compensation that are linked to performance. These are controversial for a number of reasons. Measures such as test scores are incomplete and misleading as performance outcomes. They cause unintended consequences from focusing more heavily on that which is measured, foster competition instead of collaboration among teachers, fail to reward the contribution of collaboration among teachers to student performance, and do not deal with underlying assumptions that discretionary teacher effort requires additional pay. At the same time, one of the compelling features of the annual improvement factor in the auto industry was that the three percent wage increases (over and above cost of living increases) came out of three percent year-over-year productivity gains—not out of the consumer’s pocket book. What might comparable incentive structure look like in the public sector?

### 3. *Mechanisms to Mitigate Harm*

Mechanisms to mitigate harm rarely get explicit attention in public or private sector labor relations, but systematic attention is called for since there are public goods at risk. Mechanisms are needed to balance explicitly the internal interests of union and management in assuring the workforce of fair treatment with the external responsibility to society for advancing public goods, such as the highest quality education possible. Similarly, mechanisms are needed, on the one hand, to minimize harm due to collective action by the union to advance its interests, and minimizing harm, on the other hand, due to collective action by conservative politicians seeking to gain political advantage vis-à-vis others who are supported by unions. In both cases, there are public goods that are at risk. Most promising would be to extend Malin's identification of the importance of a clearer public presence in the interactions of labor and management.<sup>104</sup> This could include, for example, preceding collective bargaining with public hearings and public surveys so that these interests are more explicitly taken into account. It could also include having public sector labor-management committees incorporating a public comment period before implementing joint initiatives. Principles of procedural justice would support these and other innovations where the public genuinely perceives that there has been a legitimate chance for input on risks to public goods and that these views have, in some ways, been taken into account.

### 4. *Diffusion of Innovation*

The literature on the diffusion of innovation emphasizes the important roles of channels<sup>105</sup> and lateral connections that are not bound by hierarchies.<sup>106</sup> Taken together, this suggests that the diffusion of innovations around school collaboration can be enhanced by establishing additional channels, such as state-level or regional-level conferences that demonstrate innovative approaches to school improvement or training initiatives to build needed skills.<sup>107</sup> Beyond the specific context of public education, a state-

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<sup>104</sup> Malin, *supra* note 25, 1370–72.

<sup>105</sup> EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* 197–201 (1962).

<sup>106</sup> DAVID ANDREWS, *THE IRG SOLUTION: HIERARCHICAL INCOMPETENCE AND HOW TO OVERCOME IT* 18–19 (1984).

<sup>107</sup> BARRY BLUESTONE & THOMAS KOCHAN, *TOWARD A NEW GRAND BARGAIN: COLLABORATIVE APPROACHES TO LABOR-MANAGEMENT REFORM IN MASSACHUSETTS* 11 (2011).

level mechanism for diffusion of innovation was offered in the Employment Policy Research Network white paper by Lewin and co-authors, which involved a three-step model:

- *Current State Assessment*: Assess relevant state-level evidence on pay, benefits, process improvements, and other relevant factors.
- *Summit Dialogue*: Convene state-level “summit meetings” with broad stakeholder representation.
- *Process Improvements*: Identify and implement process improvements and other innovations to enhance the ability of labor and management simultaneously to have constructive employment relations and effective public services.<sup>108</sup>

Moreover, these channels should not only happen at state or national levels, but mechanisms for diffusion are needed that allow for distributed engagement—lateral as well as top-down.

### 5. Research and Shared Learning

Scholars, practitioners, and policy makers can collaborate to evaluate innovative experiments and policy innovations, diffuse research findings, and drive transformation. As institutions of learning, schools represent a particularly fruitful location for new forms of “crowd sourced” learning—where teachers, administrators, para-professionals, students, parents and others can voluntarily help track relevant interactions and outcomes. With appropriate avenues for feedback, high levels of engagement are possible.

## V. CONCLUSION

Public sector collective bargaining has, from the outset, represented a contested terrain. Still, the speed and intensity of challenges to public sector collective bargaining on the heels of the recent recession were a surprise to many. Many of the challenges were anchored in inaccuracies or misperceptions. For example, there is strong empirical evidence that teachers, not the public, have absorbed the bulk of the cost of rising health care costs,<sup>109</sup> that teachers have traded wage increases for pension benefits,<sup>110</sup> and that overall public sector compensation is below that of comparably educated private sector workers.<sup>111</sup> Nonetheless, the challenges

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<sup>108</sup> LEWIN, *supra* note 53, at 1–32.1–32 (2011).

<sup>109</sup> *Id.* at 7.

<sup>110</sup> *Id.* at 8.

<sup>111</sup> *Id.* at 5.



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revealed limited public awareness of joint union-management innovations in public education, limited actual or perceived instances where unions were seen as potentially placing public goods at risk (such as being overly protective of underperforming teachers), and a lack of mechanisms to foster systematically the diffusion of innovation. Moreover, the challenges revealed a deeper need for labor, management, and communities to return to first principles and consider more robust models of collective bargaining in public education. The forces driving narrow self-interest on the parties are strong and the institution needs to ensure checks and balances within which the integrative and distributive aspects of these self-interests can be trusted to operate.

In this paper we have sought to advance this process by returning to three first principles; each of which represents a form of check and balance in society. This includes public sector collective bargaining as both a constitutional and a human right, the nature of professional work, and the realities of supply and demand in labor markets. Any challenges to public sector collective bargaining should first take into account these first principles from which the checks and balances derive.

Then, building on the first principles, we utilized the three-tier transformation framework from Kochan, Katz and McKersie<sup>112</sup> to examine the institutional requirements of creating value and mitigating harm. While there is a well-established literature on how union and management can create value at the workplace, collective bargaining, and strategic levels, the actual ways in which this happens in the public sector reflect the particular nature of this work and the degree to which value incorporates public goods. Mitigating harm is a new contribution in this article, which has as an analogue in the private sector formulation where wage gains derived from productivity gains, rather than from higher costs to consumers. In the public sector, we call for more systematic attention to ways to mitigate harm and create value, as well as new ideas on how to signal that to the public. This could include, for example, innovative ways to more fully represent the public interest in the interactions of labor and management, as well as making more clear the connections between the public interest and professional work.

The framework is further developed with a close look at education reform, building on seven case studies developed by Rubinstein and McCarthy.<sup>113</sup> We see that there are leading examples on how public sector education unions can work with management to create value and, in some

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<sup>112</sup> KOCHAN ET AL., *supra* note 45, at 11–21.

<sup>113</sup> Rubinstein & McCarthy, *supra* note 80.

respects, to mitigate harm. These are, unfortunately, what are termed “islands of success” and broader diffusion is needed.

While our focus has been on the public sector, the importance of taking into account public goods can also be applied to the private sector. There too are public goods that range from classic externalities, such as environmental impacts or the impact of layoffs on communities, to collective good issues, such as multi-employer pension plans, to much broader considerations, such as income inequality and fair treatment in society. Were attention to these and other societal considerations more explicitly and more effectively addressed by collective bargaining, it would be more clearly mitigating harm and adding value—both of which are appropriately expected of our institutions.

Ultimately, it will take a transformation of public sector (and private sector) labor relations if these forms of interaction are to overcome the current challenges and secure their role as robust societal institutions.

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**Table 1: Public Sector Legislation in 1969, 1984, and 1996, for State Employees, Police, Firefighters, Teachers, and Other Local Employees, with Challenges in 2010-2011 – “Right-to-Representation” States <sup>114</sup>**

RtR States	1969				1984				1996				Challenges 2010-2011
	No Law	Barred	Meet/ Confer	Duty to Bargain	No Law	Barred	Meet/ Confer	Duty to Bargain	No Law	Barred	Meet/ Confer	Duty to Bargain	
AK			SPFTO					SPFTO				SPFTO	
CA			SPFTO				S	PFTO				SPFTO	
CO	SPFTO				SPFO		T		SPFO		T		
CT	S			PFTO				SPFTO				SPFTO	
DE	T			SPFO				SPFTO				SPFTO	
HI	SPFTO							SPFTO				SPFTO	
IL	SPFTO						PF	STO				SPFTO	T
KY	PFO	S	T		O	S	T	PF	O		T	SPF	
ME	SPTO			F				SPFTO				SPFTO	
MD	SPFTO				SPFO			T	PFO			ST	
MA				SPFTO				SPFTO				SPFTO	⓪
MI	S			PFTO				SPFTO				SPFTO	PFTO
MN			SPFTO					SPFTO				SPFTO	
MO	PT		SFO		PT		SFO		PT		SFO		
MT	SPFTO							SPFTO				SPFTO	S
NH			SPFTO					SPFTO				SPFTO	SPFTO
NJ				SPFTO				SPFTO				SPFTO	SPFTO
NM	S		PFTO				PFTO	S			PFTO	S	
NY				SPFTO				SPFTO				SPFTO	
OH	SPFTO				SPFO		T					SPFTO	Nc
OR			SPFTO					SPFTO				SPFTO	
PA	STO			PF				SPFTO				SPFTO	
RI				SPFTO				SPFTO				SPFTO	
VT	S			PFTO				PFTO				SPFTO	
WA				SPFTO				SPFTO				SPFTO	
WI	P			SFTO				SPFTO				SPFTO	STO

<sup>114</sup> Chart adapted from R.G. VALLETTA AND R.B. FREEMAN, The NBER Public Sector Collective Bargaining Law Data Set, in WHEN PUBLIC SECTOR WORKERS UNIONIZE, (Richard B. Freeman and Casey Ichniowski eds., 1988). 1996 data is based on the extension of these data by Kim Ruben, which included adding a classification for right-to-work states. This appendix uses the categories of employees, local police, local fire, local teachers and local municipal employees based on the six point scale, but collapsed to four categories/columns here. The 2010-11 challenges are drawn from Martin Malin, The Legislative Upheaval in Public Sector Labor Law: A Search for Common Elements, 27 A.B.A. J. LAB. & EMP. L. 149, 149-165 (2012), with additional updates by private correspondence with the author (including corrections of the data for Illinois and Kentucky). Also helpful is: <http://www.ncsl.org/issues-research/labor/collective-bargaining-legislation-database.aspx>.

**Key:**

**Black/Reverse Type:** “Duty to Bargain” includes both an explicit and an implied duty to bargain

**Dark Grey/Reverse Type:** “Meet and confer” includes meet and confer, right to present proposals, and authorized (but not required) to bargain

**Lighter Grey:** “Barred” is for cases where Collective bargaining is prohibited

**Lightest Grey:** “No Law” is the absence of governing legislation

**S=State Employees; P=Local Police; F=Local Firefighters; T=Local Teachers; O=Other Local Employees**

Under 2010-11 challenges, Dark Grey/Reverse Type is used for instances where public sector rights were substantially eroded and Light Grey were there were less severe limits on the scope or bargaining process; “nc” with a blank background is used where there were challenges, but no changes, and “ch” is for challenges that are not yet resolved.

# FUTURE PROSPECTS ON A CONTESTED TERRAIN

**Table 2: Public Sector Legislation in 1969, 1984, and 1996, for State Employees, Police, Firefighters, Teachers, and Other Local Employees, with Challenges in 2010-2011 – “Right-to-Work” States <sup>115</sup>**

RtW States	1969				1984				1996				Challenges 2010-2011
	No Law	Barred	Meet/ Confer	Duty to Bargain	No Law	Barred	Meet/ Confer	Duty to Bargain	No Law	Barred	Meet/ Confer	Duty to Bargain	
AL		SPTO	F			SPTO	F			SPTO	F		
AZ	SPFTO						SPFTO				SPFTO		Ch
AR			SPFTO				SPFTO				SPFTO		
FL	SPFTO							SPFTO				SPFTO	
GA	SPFO		T		PO	ST	F		PO	ST	F		
ID	S		PFTO		S		PO	FT	S		PO	FT	T
IN	SPFTO						SPFO	T			SPFO	T	T
IO	SPFTO							SPFTO				SPFTO	Nc
KS	SPFTO						S	PFTO			S	PFTO	
LA	SPFTO						SPFTO				SPFTO		
MS	SPFTO				SPFTO				SPFTO				
NE	SPFO		T				T	SPFO				SPFTO	O
NV		SPFTO				S		PFTO		S		PFTO	O*
NC		SPFTO				SPFTO				SPFTO			
ND	SPFTO				SPFO			T	SPFO			T	
OK	SPFTO				SO			PFT	SO			PFT	O
SC	SPFTO						SPFTO				SPFTO		SPFTO
SD	SPFTO							SPFTO				SPFTO	Ch
TN	SPFTO					SPFO		T		SPFO		T	T
TX		SPFO	T			SO	T	PF		SO	T	PF	
UT	SPFTO				SPFTO				SPFTO				
VA		SPFTO				SPFTO				SPFTO			
WV			SPFTO				SPFTO				SPFTO		
WY	SPTO			F	SPTO			F	SPTO			F	Ch

<sup>115</sup> Chart adapted from R.G. VALLETTA AND R.B. FREEMAN, The NBER Public Sector Collective Bargaining Law Data Set, in WHEN PUBLIC SECTOR WORKERS UNIONIZE, (Richard B. Freeman and Casey Ichniowski eds., 1988). 1996 data is based on the extension of these data by Kim Ruben, which included adding a classification for right-to-work states. This appendix uses the categories of employees, local police, local fire, local teachers and local municipal employees based on the six point scale, but collapsed to four categories/columns here. The 2010-11 challenges are drawn from Martin Malin, The Legislative Upheaval in Public Sector Labor Law: A Search for Common Elements, 27 A.B.A. J. LAB. & EMP. L. 149, 149-165 (2012), with additional updates by private correspondence with the author (including corrections of the data for Illinois and Kentucky). Also helpful is: <http://www.ncsl.org/issues-research/labor/collective-bargaining-legislation-database.aspx>. Note that Indiana is included in table 2 even though it just became a right-to-work state. Though Phoenix does have a municipal ordinance, the state of Arizona does not. Also helpful is <http://www.ncsl.org/issues-research/labor/collective-bargaining-legislation-database.aspx>.

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\* Note: The Nevada law restricted bargaining for doctors, lawyers, and some supervisors.